IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 376

FREDERIC W. PROCTER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC W. PROCTER,
Petitioner, Pro Se.

THOMAS H. FISHER,
Of Counsel.

UNITED STATES LAW PRINTING COMPANY, CHICAGO

INDEX.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your Petitioner, Frederic W. Procter, praying for a writ of certiorari to review a decision in the United States Circuit Court of Appeals for the Fourth Circuit, respectfully submits:

This is a gift tax case. On January 13, 1939 petitioner executed an Indenture of Trust, appearing on pages 25-40

of the Transcript of Record. This Trust Indenture recited that petitioner was the owner of "a vested future estate" in the *inter vivos* trust established by petitioner's grandfather, Harley T. Procter, on December 29, 1914 and another "vested future estate" in the testamentary trust established by Article Sixth of the Last Will and Testament of Harley T. Procter which was probated in New York County on June 4, 1920 (R. 25-6).

The description of the first trust remainder as "vested" was erroneous, for it was a "contingent remainder" which would vest *only* if petitioner survived his mother, the life tenant (R. 36). The second trust remainder was subject to divestment if petitioner died before his mother or before reaching the age of 40 years (R. 42).

Both remainders were pledged as collateral security to petitioner's *demand* notes totalling $686,300.03 (R. 53) held by his mother. On June 1, 1942 petitioner's mother demanded payment of the $686,300.03 promissory notes (R. 53); and on November 12, 1942 petitioner sued to restrain foreclosure of his trust remainders which were pledged to secure these notes (R. 6).

By the foregoing Trust Indenture, petitioner, "in consideration of his love and affection for his children and his desire to provide for their future" and other considerations, irrevocably transferred, assigned and conveyed to three trustees "so much of all his right, title and interest in and to the trust fund and remainder created by" said *inter vivos* and testamentary trusts "as will remain (a) after the satisfaction and payment of the indebtedness to Lillian S. Procter represented by the aforementioned seven notes (held by petitioner's mother totalling $686,300.03), and (b) after a further deduction, if any

becomes necessary, from said remainders, of the amount provided for in Article 'Eleventh' hereof" (R. 27). The Trust Indenture then provided that petitioner retained a life estate in the trust property, with a remainder to his children (R. 27-8).

After granting the trustees the usual powers it was provided in Article "Eleventh" as follows:

> "Eleventh: The settlor is advised by counsel and satisfied that the present transfer is not subject to the Federal gift tax. However, in the event it should be determined by final judgment or order of a competent Federal court of last resort that any part of the transfer in trust hereunder is subject to the gift tax, it is agreed by all the parties hereto that in that event the excess property hereby transferred which is decreed by such court to be subject to gift tax, shall automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of Frederic W. Procter free from the trust hereby created."

Under Article "Ninth" the trust was made irrevocable; and under Article "Twelfth" the trust and the indenture were to be "in all respects governed, construed and regulated by the laws of the State of New York" (R. 34-5).

At the time petitioner made the transfer aforesaid he was 36 years of age and his mother was 63 years of age (R. 5). The stipulated value of the corpus of each of the two trusts on the date of the transfer was $928,593.70 in the *inter vivos* trust, and $961,551.68 in the testamentary trust (R. 13).

Petitioner and respondent stipulated before the Tax Court of the United States to two actuarial factors, as follows:

1. The present worth of $1 due at the death of a person aged 36 provided that a person aged 63 years shall have died before the person aged 36 is $0.25152.

2. The present worth of the right to receive $1 at the death of a person aged 36 years provided such death occur after four years and after the death of a person aged 63 years is $0.24883 (R. 16).

Two additional actuarial factors were agreed to by the parties before the Circuit Court of Appeals for the Fourth Circuit, as follows:

3. The present worth of $1 due at the death of a person aged 63 years is $0.56445.

4. The present worth of the right to receive $1 at the death of a person aged 63 years provided such death occur after four years is $0.55377 (R. 74).

There was no actuarial or other evidence in the Record by which the effect of the possible foreclosure and sale of petitioner's remainders under the pledge to secure the $868,300.03 *notes, if valid, could be determined. Nor was there any evidence to show what value, if any, would be left to petitioner after payment of the notes therefrom. The trust assets are securities fluctuating daily in value, so that no human mind can state the "equity", if any, which will remain in the remainders if and when the notes are paid.*

The Commissioner valued the gift to the children at $310,252.32 and assessed a gift tax for the calendar year 1939 in the sum of $36,487.85 (R. 2-3, 8-11, 60-6) under Sec. 501 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Sec. 502 (as amended by Sec. 301 (a) of the Revenue Act of 1935, c. 829, 49 Stat. 1014); and under Articles 2, 3 and 11 of Treasury Regulations 79 (1936 Ed.). The statute and regulations are set forth in the Appendix hereto.

This cause having been brought before The Tax Court of the United States to defeat the tax, The Tax Court rendered a decision (R. 12-20) computing the gift to the children as follows:

Value of corpus of *inter vivos* trust	$928,593.70	
$.25152 (value of $1 at petitioner's death) times $928,593.70 equals		$233,559.89
Value of corpus of testamentary trust	$961,552.68	
$.24883 (value of $1 at petitioner's death over 40) times $961,552.68 equals		239,263.15
		$472,823.04
Deduct promissory demand notes		686,300.03
Value of gift to children		Zero

Respondent appealed the case to the United States Circuit Court of Appeals for the Fourth Circuit, which rendered a decision on April 11, 1944 (R. 71-7) computing the value of the gift to the children as follows:

Value of corpus, *inter vivos* trust	$928,593.70	
$.56445 times $928,593.70 equals		$524,144.71
Notes	686,300.03	
Deduct	524,144.71	
	$162,155.32	
$162,155.32 divided by $.55377 equals		292,820.70
Value of corpus, testamentary trust	$961,552.68	
Deduct	292,820.70	
	$668,731.98	
$.24883 x $668,731.98 equals value of gift to children		$166,400.57

Since the amount of the gift tax, if any, is still subject to determination by the Tax Court, we do not submit any controversies over the foregoing computations to this Court.

In its opinion the Circuit Court of Appeals held that Article "Eleventh" is contrary to public policy, for reasons hereinafter discussed in the Argument, and is absolutely void.

A petition for rehearing was denied on May 31, 1944 (R. 93).

Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Fourth Circuit in this case reversing the decision in The Tax Court of the United States directly conflicts upon a question of Federal law with the provisions of Sections 501 and 502 of the Revenue Act of 1932 as amended, and Articles 2, 3 and 11 of Treasury Regulations 79, as well as with the decisions of this Court in the cases of *Smith* v. *Shaughnessy,* 318 U. S. 176 and *Robinette* v. *Helvering,* 318 U. S. 184.

The Questions Presented.

There are two questions presented:

1. Is the remainder interest transferred by petitioner into trust for the benefit of his children such a vague, conditional, contingent and speculative right that it cannot be valued by any "recognized method" and is therefore not subject to the gift tax?

2. Is Article "Eleventh" of the Trust Indenture executed by petitioner absolutely void as against public policy, or is it valid as a condition precedent to the taking effect of the alleged gift?

Reasons for the Allowance of the Writ.

Until the decision in this case, Sections 501 and 502 of the Revenue Act of 1932, as amended, and Articles 2, 3 and 11 of Treasury Regulations 79 have invariably been construed to provide that the conveyance of future interests which are so vague, conditional, contingent and speculative as to be without any possible valuation by any actuarial or other "recognized method" are not intended to be subject to the gift tax. This clearly appears from the opinion of Mr. Justice Black in the case of *Robinette* v. *Helvering*, 318 U. S. 184.

It, therefore, amply appears that the decision of the Circuit Court of Appeals for the Fourth Circuit in this case is *directly in conflict upon a question of Federal law* with Sections 501 and 502 of the Revenue Act of 1932, as amended, and Articles 2, 3 and 11 of Treasury Regulations 79, and with the decision of this Court in the *Robinette* case.

The question involved is important. If taxpayers are to be subject to a gift tax upon transfers of future interests *which have no computable or ascertainable value*, and if the opinion of Mr. Justice Black in the *Robinette* case is to be ignored by the Circuit Courts of Appeals, it should only be upon a square decision by this Court to that effect.

Moreover, if under the right of private property as it has always existed in the United States an owner cannot subject a wholly voluntary transfer thereof to any condition precedent which is not in itself unlawful, such a result should only be reached by a decision of the highest court of the land.

There is no public policy in favor of compelling a donor to make an unconditional gift *which he has no wish to make* merely so as to aid the public Treasury, and thus to compel him to pay a gift tax which he has no willingness to pay.

WHEREFORE petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, the full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; that said final order of said Circuit Court of Appeals be reviewed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

FREDERIC W. PROCTER,
Petitioner, Pro Se.

THOMAS H. FISHER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The United States Circuit Court of Appeals for the Fourth Circuit rendered its original opinion in this case on April 11, 1944. The opinion is reported in 142 Fed. (2d) 824, and is set forth on pages 71 to 77 of the Record.

Subsequently, a petition for rehearing having been filed, the Circuit Court rendered a supplemental opinion on May 31, 1944, denying the petition. The opinion is reported in 142 Fed. (2d) 828, and is set forth on pages 91 to 93 of the Record.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fourth Circuit on April 11, 1944 and rehearing was denied on May 31, 1944. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911 c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented see page 1 through 8 above.

Specification of Errors.

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In reversing the judgment of The Tax Court of the United States in this cause.

2. In not affirming the judgment of The Tax Court of the United States in this cause.

3. In denying the petition for rehearing in this cause.

4. In finding that the future interests transferred by petitioner into trust were of such a computable or ascertainable value as to be subject to the gift tax (Revenue Act of 1932 as amended).

5. In finding that Article "Eleventh" of the Trust Indenture executed by petitioner on January 13, 1939 was contrary to public policy.

6. In not finding that the future interests transferred into trust by petitioner for the benefit of his children are so vague, conditional, contingent and speculative as to have no computable or ascertainable value by any actuarial or other recognized method and therefore are not subject to gift tax.

7. In not finding that Article "Eleventh" is a valid condition precedent to the validity and effectiveness of the trust, the effect of which when fulfilled is to preclude any liability for gift tax based upon the execution of such Trust Indenture.

ARGUMENT.

I.

The Alleged Gift was without Computable or Ascertainable Value and was therefore not subject to Gift Tax.

As shown above, petitioner's interest under the Harley T. Procter trust *inter vivos* is a contingent remainder, not a vested remainder, the contingency being that petitioner must survive his mother before he takes any interest whatsoever in the corpus of the *inter vivos* trust of a value of $928,593.70. See Gray, "The Rule against Perpetuities," 3rd Ed. 1915, Sec. 108. "On a devise to A for life his remainder to such of his children as survive him, remainder is conteingent." *Riddle* v. *Killian,* 366 Ill. 294, 303, 8 N. E. (2d) 629, 633.

Petitioner's interest under the testamentary trust appears to be a vested remainder subject to divestment. The divestment is to occur either (a) if he fails to reach the age of 40 years, or (b) if he fails to survive his mother.

It is the position taken by the Circuit Court of Appeals in its two opinions that the stipulated actuarial factors make it possible to compute not only the value of petitioner's remainder interests under the Harley T. Procter trusts, but also the value of that portion thereof which petitioner transferred to his children by the Trust Indenture of January 13, 1939.

However, petitioner's remainder interests were pledged to secure his $686,300.03 demand promissory notes held

by his mother; and the Trust Indenture of January 13, 1939 specifically provided that petitioner transferred the trustees under the Trust Indenture *only so much* of his remainder interests under the Harley T. Procter trusts "as will remain (a) *after the satisfaction and payment* of the indebtedness to Lillian S. Procter represented by the aforementioned seven notes."

Thus the gift in this case was subject to be taken from both the donor and the donees (a) by foreclosure of the notes or by the fall of the market value of the corpus of the remainders below petitioner's indebtedness, as well as (b) by petitioner's failure to survive his mother. It must be admitted by respondent, as well as by the Circuit Court of Appeals, that *there is no actuarial or other method by which these future interests conveyed under the Trust Indenture can be computed or ascertained by any actuarial or other "recognized method."*

For "although actuarial science may have made great strides in appraising the value of that which seems unappraisable" (to quote from Mr. Justice Black in the *Robinette* case, as we show below), it is an utter impossibility to value the gift in this case *subject to* the pledge of the remainders to secure the $686,300.03 of *demand* promissory notes, which, assuming their validity, may not become due or be paid for an indeterminable period.

The Circuit Court in its opinion says that "under the decision in the *Shaughnessy* case, this distinction (*i. e.*, whether the remainders conveyed were vested or contingent) is immaterial" (R. 75). The reference here is to *Smith* v. *Shaughnessy*, 318 U. S. 176. But in the *Shaughnessy* case the taxpayer, according to Mr. Justice Black's opinion, "made an irrevocable transfer in trust of 3,000

shares of stock worth $571,000" (R. 84). In other words, the donor in the *Shaughnessy* case was *the absolute owner* of the full title to the property which he conveyed into trust. His interest was the equivalent of a "fee simple absolute" in land. He did not own merely a contingent remainder therein (the trust *inter vivos*) nor a vested remainder subject to be divested (the testamentary trust) and much more importantly, he did not make his conveyance subject to the prior pledge of the 3,000 shares of stock as collateral security to his demand indebtedness of $686,300.03, as did petitioner in the case at bar.

There is therefore nothing parallel between the *Shaughnessy* case and the case at bar *upon the facts;* and the *Shaughnessy* case did *not* hold that the donor of an interest which cannot be ascertained or computed by any actuarial or other recognized method is subject to the gift tax.

Turning to the case of *Robinette* v. *Helvering,* 318 U. S. 184, we find language by Mr. Justice Black which we submit is squarely in conflict with the two opinions of Mr. Justice Parker in the case at bar. In the *Robinette* case, exactly as in the *Shaughnessy* case, the property owned by the donor was owned in absolute ownership, the property being worth $193,000 and $680,000. Mr. Justice Black had to decide whether an admittedly taxable future interest created in this property was to be "cut down" by virtue of an interest therein *which he said was so conditional and speculative as to be impossible of valuation by any known actuarial means.* Mr. Justice Black said:

> "In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship (of the life tenant, the daughter) but also upon the death of the daughter without issue who should reach the age of 21 years. The petitioner does

not refer us to *any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder.* It may be true as the petitioner argues that trust instruments such as these before us frequently create 'a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transfered or released simultaneously.' But before one who gives (t)his property away by this method is entitled to deduction from his gift tax on the basis that he had retained some of these complex strands it is necessary that he at least establish the *possibility of approximating what value he holds.* Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included consideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. *Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. Humes* v. *United States,* 276 U. S. 487, 494." (Italics added.)

Petitioner submits that Mr. Justice Black here in effect correctly holds that there may exist such speculative and conditional rights and interests that no actuarial value nor, indeed, any other value by "any recognized method" can be assigned to them, even though they may be the subject of a valid transfer or conveyance. Mr. Justice Black, we submit, is here further correctly deciding that property which has no ascertainable or computable value by any recognized method must be ignored for gift tax purposes.

While it is true enough that in the *Robinette* case Mr. Justice Black held that such an unascertainable and uncomputable interest could not be used to "cut down" a

gift tax otherwise due, because that is the way in which the question presented itself to him in the *Robinette* case, nevertheless the converse must be equally true, *i. e.*, that an interest which is so vague, conditional, contingent or speculative as to be without any possible valuation by any actuarial or other "recognized method" cannot be made the subject of a gift tax. This, we submit, is the situation in the case at bar.

If the daughter (the donor) in the *Robinette* case had conveyed $873,000 worth of property into trust, the *income* to be payable to her issue *provided* (1) that she be married, (2) that she was able to have children, (3) that she actually bore the children, and (4) that the children lived to the age of 21 years, at the same time retaining for herself the full reversion and remainder in the trust fund, would such a conveyance be subject to the gift tax? Clearly under the language of Mr. Justice Black's opinion in the *Robinette* case it would *not*, because it could have no ascertainable or computable value. This, we submit, is the correct result and is conclusive in favor of petitioner in the case at bar.

Indeed, we feel that the instant case is of vast significance because *it is the first case in the history of the gift tax law*, so far as we know, in which a donor of *such a vague interest that it cannot be valued* has been held subject to a gift tax. Merely because petitioner conveyed a "contingent remainder" *to his children under* the Trust Indenture of January 13, 1939 *out of such a contingent and speculative interest under the Harley T. Procter trusts*, would not render it *more* taxable.

It is of course true, as Mr. Justice Black says in the *Shaughnessy* case, that "For many years Congress has sought vigorously to close tax loopholes against ingenious

trust instruments," adding, "The language of the gift tax statute, 'property . . . real or personal, tangible or intangible,' is broad enough to include property, however conceptual or contingent." But Mr. Justice Black is here applying this language to the *donee's interest* in the property given and received under the terms of the gift, and not to the *donor's interest.* No matter how earnestly Congress has sought 'to close tax loopholes against ingenious trust instruments," it was never intended to tax a gift which had no ascertainable or computable value by any actuarial or other "recognized method."

Petitioner submits that this question is of the very greatest importance and that the Circuit Court's opinions in this case should not be allowed to stand without a review by this Court. Where, as in the case at bar, the interest conveyed by the donor is subject to Federal estate tax upon petitioner's death, *the gift tax should not be imposed upon the transfer in trust of property which has no ascertainable or computable value at the time of the gift.*

II.

Article "Eleventh" of the Trust Indenture is not Void as Against Public Policy.

The Circuit Court of Appeals condemns Article "Eleventh" of the Trust Indenture of January 13, 1939 as "contrary to public policy for three reasons: In the first place, it has a tendency to discourage the collection of the tax by the public officials charged with its collection, since the only effect of an attempt to enforce the tax would be to defeat the gift. In the second place, the effect of the condition would be to obstruct the administration of justice by requiring the courts to pass upon a moot case . . . . In the third place, the condition is to the effect that the final

judgment of a court is to be held for naught because of the provision of an indenture necessarily before the court when the judgment is rendered" (R. 76-7).

It is petitioner's position that there is no validity to any of these grounds for condemning Article "Eleventh" as contrary to public policy, but that on the contrary Article "Eleventh" is perfectly valid and enforceable as a condition precedent to the effectiveness of the transfer into trust. Before considering the three grounds stated by the Circuit Court, we wish to cite some of the authorities supporting such a condition precedent.

The common law courts have unanimously and invariably given full effect to a condition nullifying and voiding a transfer where the intention so to do is clearly expressed in the document.

Mayer v. *Am. Sec. & Tr. Co.*, 222 U. S. 295;
Boehme v. *Fraase*, 291 Ill. 571;
Rankin v. *Dean*, 47 So. 1015;
Spinks v. *First Christian Church*, 273 S. W. 815;
Duell v. *Leslie*, 106 S. W. 489;
Emery v. *Dana*, 84 Atl. 976.

Against these cases respondent took the position that the condition precedent therein was void as repugnant to the gift. By the overwhelming weight of authority, however, an instrument of transfer, which contains two clauses which appear to be inconsistent, is invariably sustained where any possible construction can be given thereto which would not make them repugnant and void. Under this doctrine all such clauses as Article "Eleventh" are construed to be conditions limiting the effect of the transfer itself. In other words, the courts will invariably adopt that construction of the instrument which will give validity to both

provisions if possible, and particularly where the second clause can be held to be merely a condition precedent to limit the prior transfer.

Reuter v. *Reuter*, 218 N. W. 86;
Iowa Farm Credit Corp. v. *Halligan*, 241 N. W. 475;
Ogletree v. *Abrams*, 67 S. W. (2) 227;
Hansen v. *Bacher*, 299 S. W. 225;
Associated Oil Co. v. *Hart*, 277 S. W. 1043;
Shugart v. *Shugart*, 233 S. W. 303; 248 S. W. 328;
Hughes v. *Gladewater*, 76 S. W. (2) 471;
Word v. *Kuykendall*, 246 S. W. 757;
Grogan v. *City of Brownwood*, 214 S. W. 532.

Many other similar cases could be cited from practically every common law jurisdiction.

The merest glance at Article "Eleventh" shows that it is a condition precedent to the creation of the trust and limits the transfer to the trustees therein. For if the condition be fulfilled, then that part of the transfer subject to the condition "shall automatically be deemed" to be excluded from the transfer and to "remain the sole property" of petitioner "free of the trust hereby created."

This is the classic language of a condition precedent. Since the gift tax arises at the very date of execution of the instrument, if it arises at all, and since the word "automatically" is inserted to limit the effect of the transfer, and since, finally, Article "Eleventh" specifically precludes the property described under the conditions named from forming part of "the trust hereby created," it necessarily follows that no transfer could take place until the condition of non-taxability is fulfilled.

There is no repugnance between a condition precedent and words of outright transfer, nor is there any reason why a donor cannot limit his transfer by any condition precedent which he (the donor) shall determine. The trust instrument in this case is by its terms executed merely for love and affection. The donor had, on the date of the execution of the instrument, *the fullest and completest conceivable right to insert any condition precedent to the effectiveness of the trust which he might elect in his unfettered discretion.*

This condition is not a condition subsequent rather than a condition precedent, merely because it takes effect after the date of the alleged transfer. Every condition precedent must take effect after the date of the instrument in question; and since in this case the condition was precedent to the passage of the interest into trust, it is a condition precedent and is not a condition subsequent to divest the trustees of such interest.

Turning now to the issue of public policy, we discuss each of the three grounds for the Circuit Court's holding that the condition contained in Article "Eleventh" is contrary to public policy, as follows:

1. The Circuit Court maintains that Article "Eleventh" "has a tendency to discourage the collection of the (gift) tax by the public officials charged with its collection, since the only effect of an attempt to enforce the tax would be to defeat the gift." (R. 76.)

We submit, however, that if this were a valid criticism of Article "Eleventh," *no donor could ever make a conditional gift* without being subject to the ruling that for gift tax purposes the condition, if effective and fulfilled, would

prevent the collection of the tax, and therefore the condition was contrary to public policy.

Expressed in this manner it is obvious that there is no foundation to this ruling by the Circuit Court in this case. *A donor has, under our system of private property, an unrestricted right to make any conditional gifts he wishes.* If he wishes to provide that the gift shall not be effective upon any contingency, no matter how speculative, this is his right; and the condition will not be stricken down for gift tax purposes merely because, if the condition is performed, the gift tax cannot then be collected *because the "gift" has "automatically" failed.*

2. The Circuit Court's second argument is that Article "Eleventh" would "obstruct the administration of justice by requiring the courts to pass upon a moot case," citing *Lord* v. *Veazie*, 8 How. 257, and *Van Horn* v. *Kittitas County*, 112 Fed. 1 (R. 76).

We submit that there is nothing moot whatever about the issue in this case. On the contrary, it represents *a genuine controversy* over a gift tax which respondent claims should be levied in the sum of $36,487.85, and which petitioner denies is validly due.

The *Veazie* case involved an appeal to the Supreme Court from a consent decree, to which all of the parties had united in the trial court for the ulterior motive of affecting other persons not parties to the litigation. Mr. Chief Justice Taney quite properly held that this was an improper use of the judicial process. But who can say that there is the slightest analogy or similarity between that case and the case at bar?

As for the *Kittitas* case, it is a decision rendered by the Circuit Court for the Western District of Washington in 1901, and was neither appealed nor has it ever been cited in any other court. The decision in that case was that a contract, which required litigation of a moot case in another court, could not be lawfully enforced in a second proceeding, because such a contract is "entirely void." Obviously the case at bar does not involve a contract or conveyance which requires the prosecution of a moot case through another court.

It is true enough that in the case at bar not only is the amount of the gift tax to be determined, but also the issue as to whether *any gift tax is due* must also be settled. The Circuit Court of Appeals says that the latter question of the validity of the gift can only be determined "between the donor and persons not before the Court." But controversies regarding gift taxes (and income taxes) between taxpayers and the Commissioner of Internal Revenue arise and are litigated in our courts every day, without third parties, who are not involved in the payment of the tax, being before the Tax Court. Very frequently the determination of whether a gift tax is due involves the validity and effect of transfers to third persons who are not parties to the tax litigation. Indeed, this is the standard situation in all gift tax controversies, except in the rare instance where the Commissioner is seeking to collect the tax from the donee. Such litigation is not moot.

Until the decision by the Circuit Court in the case at bar, no one ever said that the validity of a gift and the interpretation of a condition precedent in a transfer alleged to be subject to the gift tax presented a moot case because the donee was not a party to the tax proceedings.

3. The Circuit Court's third ground for holding Article "Eleventh" contrary to public policy is that Article "Eleventh" "could not be given the effect of invalidating a judgment which had been rendered when the instrument containing the condition was before the court, since all matters are merged in the judgment. To state the matter differently, the condition is not to become operative until there has been a judgment; but after the judgment has been rendered it cannot become operative because the matter involved is concluded by the judgment." (R. 77.)

This begs the whole issue; for it *assumes* that a *valid* judgment levying the gift tax is *first* rendered, and argues that, *after such a valid judgment has been rendered,* "the matter" (*i.e.,* the liability for gift tax) "is concluded by the judgment." But petitioner here denies that a valid judgment for the gift tax has been, or can be, rendered *in the first place, because that is the very condition precedent to the taking effect of the gift itself.*

Why does it so shock the Circuit Court that *an ineffective effort* to make a gift has been attempted here, and that it must find that *the gift itself has failed?* Many another transfer of property has been attempted by the owner, but has been held ineffective, and therefore not subject to taxation. Let us suppose a taxpayer attempts to sell property at a taxable profit, but in a tax proceeding it plainly appears, as here, that the "sale" is void or otherwise ineffective. May the tax court by judicial fiat transform the invalid "sale" into a valid transfer *on grounds of "public policy," in order to enable the taxing authorities to collect a tax? Obviously not.*

It certainly can make no difference that the *transferee* of the property, whether a "gift" or a "sale" be under

consideration, is not "concluded by the (tax) judgment," for under our Federal law, the question of tax liability is to be determined *only between the taxpayer and the Commissioner*. No Federal taxing statute has ever provided that if an attempted, but ineffective, "sale" or "gift" is made, a tax may be collected thereon merely because the alleged "buyer" or "donee" is *not a party to the tax case*. If the Circuit Court in this case intends to add this provision to the taxing statutes, it can only do so by what amounts to "judicial legislation." No argument about "public policy" can, we submit, justify this result.

Let us assume that petitioner had inserted the provision that the transfer into trust would be ineffective as to any property subject to general real estate taxes in the State of New York. Let us next assume that, in spite of the taxpayer's legal advice to the contrary, one parcel of such real estate in New York was subject to general real estate taxes. There surely would not be the slightest ground for any court holding that such a condition precedent was ineffective merely because the condition defeated the transfer of the particular property found to be subject to such taxation.

Article "Eleventh" merely amounts to the taxpayer saying in effect: "As I understand the gift tax law on the date of this instrument, my understanding being based upon the advice of my counsel, there are no gift taxes due from me by virtue of all or any part of this transfer; but if for any reason my counsel should be wrong and this transfer in trust should be held subject to gift tax by a court of final appeal, then and in that event the transfer into trust aforesaid shall be subject to the condition that

all or so much of the property so taxed shall not form a part of such transfer, but shall automatically be and remain my own property as though this instrument had never been executed."

Surely if the right of private property exists under our law, an owner of property can make his wholly voluntary transfer thereof subject to any conditions precedent which he as owner of such property may desire. If one of such conditions is that the donor shall not be liable to pay a tax which the donor has no willingness to pay, that is a matter of which neither the donee nor the Commissioner can complain. We repeat that *there is no public policy in favor of compelling donors to make unconditional gifts so as to aid the public Treasury.* Yet this is the whole substance of the criticism of Article "Eleventh" by the Circuit Court of Appeals.

A petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in this case is therefore respectfully prayed, to the end that the judgment of the Circuit Court may be reversed and the decision of The Tax Court of the United States affirmed.

Respectfully submitted,

FREDERIC W. PROCTER,
Petitioner, Pro Se.

THOMAS H. FISHER,
Of Counsel.

APPENDIX.

REVENUE ACT OF 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

SEC. 502. COMPUTATION OF TAX (as amended by Section 301 (a) of the Revenue Act of 1935, c. 829, 49 Stat. 1014).

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

Gift Tax Rate Schedule.

(The amendment above referred to refers only to the gift tax rate schedule.)

* * * * *

TREASURY REGULATIONS 79 (1936 Ed.):

ART. 2. *Transfers reached.*—The statute imposes a tax

whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Thus, for example, a taxable transfer may be effected by the declaration of a trust, * * *.

ART. 3. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. * * *

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

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CITATIONS

609029—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 376

FREDERIC W. PROCTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court of the United States (R. 12a–20a), entered July 6, 1943, are unreported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, filed April 11, 1944 (R. 71–77), and its *per curiam* opinion upon rehearing (R. 91–93), are reported in 142 F. (2d) 824, 828.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 11, 1944 (R. 78). The petition for rehearing was denied May 31, 1944 (R.

93). The petition for a writ of certiorari was filed August 21, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a gift by petitioner of his remainder interests in two trusts created by his grandfather is so vague, conditional, contingent, and speculative as to be impossible of valuation by any actuarial or other recognized method, either because the corpus might be subjected to the payment of a debt owed by petitioner, or because his right thereto depended upon his outliving the life beneficiary.

2. If the gift be taxable, whether any tax is due since the trust indenture provides that, if a federal court of last resort determines that any of the gift is taxable, the property shall be deemed not included in the conveyance.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether

the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

Treasury Regulations 79 (1936 Ed.):

ART. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Thus, for example, a taxable transfer may be effected by the declaration of a trust, * * *.

ART. 3. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable. * * *

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal

> term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

On January 13, 1939 the petitioner, Frederic W. Procter, made a gift in trust to his surviving children or the issue and widows of any children predeceasing him of so much of his future right, title, and interest in each of two trusts which had been established by his grandfather as would remain after the payment of a debt to his mother of $686,300.03 (R. 12a–16a). The petitioner reserved a life interest in the trust he had created (R. 27). On the date of the transfer in question, the petitioner was 36 years of age and his mother 63 (R. 5a). One of the trusts created by the petitioner's grandfather was an *inter vivos* trust; the other was testamentary (R. 5a–6a). Under the terms of the *inter vivos* trust, valued at $928,593.70 at the date of the gift, the petitioner was to receive the corpus thereof upon the death of his mother, the life tenant, if he survived her. Under the terms of the testamentary trust, valued at $961,552.68 at the date of the gift, he was to receive the corpus thereof upon the death of his mother if he reached the age of 40 and survived her. (R. 13a.)

The eleventh article of the trust indenture (R. 14a, 34) provides as follows:

> The settlor is advised by counsel and satisfied that the present transfer is not subject to Federal gift tax. However, in the event it should be determined by final judgment or order of a competent Federal Court of last resort that any part of the transfer in trust hereunder is subject to gift tax, it is agreed by all the parties hereto that in that event the excess property hereby transferred which is decreed by such court to be subject to gift tax, shall automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of Frederic W. Proctor free from the trust hereby created.

In calculating the net value of the petitioner's interests in these trusts, the Commissioner, in effect, deducted the petitioner's indebtedness to his mother from the value of the corpora of the trusts, by deducting it in full from the value of the corpus of the *inter vivos* trust because that was greater than the debt. He then applied a separate actuarial factor to the value of the petitioner's interest in each trust, as ascertained, in order to determine the present value of the gift of the corpus of each. (R. 8a–11a.) These factors were later incorporated in a stipulation filed with the Tax Court (R. 6a) and were adopted by it in its findings (R. 16a). The factor thus applied by the Commissioner to the value of the

petitioner's interest in the *inter vivos* trust was $0.25152, representing the present worth of the right to receive $1 at the death of a person aged 36, provided that a person aged 63 shall have died before him (R. 10a). And the factor thus applied by the Commissioner to the value of the petitioner's interest in the testamentary trust was $0.24883, representing the present worth of the right to receive $1 at the death of a person aged 36, provided such death occurs after four years and after the death of a person aged 63 (R. 11a).

Accordingly, the Commissioner determined that the value of the gift of both interests was $310,-252.32 (R. 11a) and that the tax thereon was $36,487.85 (R. 9a). At the hearing before the Tax Court, however, the Commissioner conceded that under the stipulated total value on the basic date of the corpora of the trusts, using the factors employed in his notice of deficiency (Commissioner's Exhibit F, R. 8a–11a), the value of the gift would be $300,204.86 (R. 17a).

The Tax Court held that, since the debt was payable on demand, as the petitioner had contended, and not alone at the death of his mother, as the Commissioner had contended (R. 18a–20a), the debt was not deductible from the value, on the date of the gift, of the corpora of the trusts, but from the value on that date of the petitioner's interest therein. But, in determining the value of the gift made of the petitioner's interest in the

inter vivos trust, the Tax Court applied the first stipulated factor to the stipulated value of the corpus of that trust, instead of to the value of the petitioner's interest therein, which it did not ascertain. Similarly, the Tax Court determined the value of the gift made of the petitioner's interest in the testamentary trust by applying the second stipulated factor to the stipulated value of the corpus of that trust, instead of to the value of the petitioner's interest therein. Thus the Tax Court determined that the total value of the petitioner's interests in the corpora of the trusts, as of the date of the gift, was less than his indebtedness to his mother, and that the gift of the residue of his interests therefore had no value. Accordingly, it held that the petitioner was not liable for any tax. (R. 19a–20a.)

The court below sustained the Tax Court in holding that the petitioner's debt to his mother should be deducted from the value of his interests in the trusts rather than from the value of their corpora (R. 73–74). However, as the court below pointed out, the Tax Court had, by applying the stipulated factors to the value of the corpora of the trusts, instead of to the value of the petitioner's interests therein, in effect, ascertained the present value of the petitioner's interests in the trusts not with reference to his mother's death, when he became entitled thereto, but with reference to his own death, when his children would receive the economic benefits of his gift. The court below

held that, in this respect, the Tax Court had committed reversible error. (R. 74.) It therefore remanded the case to the Tax Court for further proceedings not inconsistent with its opinion (R. 77); that is, to determine the amount of the tax by the use of a formula which the court below explained, and which involved the use of what the court regarded as the proper criteria in its determination (R. 74–75). The court below also rejected the petitioner's contention that the decision of the Tax Court should nevertheless be affirmed on three additional grounds, namely, (1) that the interests subjected to the gift tax would be subject to estate tax upon the petitioner's death and hence were not subject to gift tax; (2) that the interests of the petitioner in the trusts were of too contingent a character for a gift thereof by him to be subject to the gift tax, and (3) that under the eleventh article of the trust indenture the gift was not to become effective if subject to a gift tax (R. 75–77).

The petitioner filed a petition for a rehearing (R. 79–90), which the court below denied pursuant to a *per curiam* opinion in which it not only rejected the petitioner's complaint that the computation made in its opinion by way of illustration for guidance of the Tax Court was improper, but also again disposed of the three above-mentioned contentions which the petitioner had renewed (R. 91–93).

ARGUMENT

The petitioner does not challenge the decision of the court below either in respect of its holding that the Tax Court erred in the method it used in computing the value of the gift, or in respect of the method which the court required the Tax Court to use. The petitioner's complaint here is two-fold (Pet. 7): First, that the interests of the petitioner in the trusts created by his grandfather are "so vague, conditional, contingent and speculative as to be without any possible valuation by any actuarial or other 'recognized method' " and that, in requiring the valuation of such interests and the imposition of the tax upon the gift thereof, the decision of the court below is in conflict with the decision of this Court in *Robinette* v. *Helvering,* 318 U. S. 184. Second, that no tax was due because under the eleventh article of the trust indenture (R. 75), the gift was conditioned upon a final determination by a federal court of last resort that the gift was not subject to the federal tax.

1. The asserted conflict between the decision of the court below in the case at bar and the decision of this Court in the *Robinette* case is nonexistent. The principal question in that case was whether there was a taxable gift of certain remainders. The taxpayer's contention that the transfer of such remainders was not subject to the tax did not rest on the premise that her interest in the

property was contingent, for it was not, but on the premise that there were no donees at the date of the transfer who could accept the remainders. The Court rejected this contention and the petitioner does not claim that the decision of the court below is in conflict on this point with that of this Court in the *Robinette* case. It further appeared in that case, however, that the donor had retained a reversionary interest. She therefore made a further alternate contention that, in computing the value of the remainders, allowance should be made for the value of such interest, as was done in the case of *Smith* v. *Shaughnessy*, 318 U. S. 176. The Court also rejected this contention, pointing out that, whereas in the *Smith* case the grantor's reversionary interest depended only upon his surviving his wife, in the *Robinette* case the donor's reversion depended not alone upon the possibility of survivorship, but upon the death of the donor without issue who would reach the age of 21. There is obviously no such contingency here and no such question. Here the petitioner's right to receive the corpora of the trusts his grandfather had created depended solely, as regards the *inter vivos* trust, upon his surviving his mother and, as regards the testamentary trust, upon his surviving his mother and reaching the age of 40.

It is, of course, well settled that gifts of contingent interests are subject to the tax. Section

501 of the Revenue Act of 1932, *supra,* levies the tax upon all gifts, and Section 504 (b), set out in the margin,[1] excepts from the $5,000 exclusion therein provided gifts of future interests. Thus the Court in the *Robinette* case, *supra,* said (p. 187) that gifts of future interests are taxable under Section 504 (b). The applicable regulation (Article 11 of Treasury Regulations 79 (1936 Ed.), *supra*) defines "future interests" as including reversions, remainders, and other interests or estates, whether vested or contingent; and this regulation has received the blanket approval of this Court. See *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, and *United States* v. *Pelzer,* 312 U. S. 399. Moreover, the value of the gift of the petitioner's future interests here in question was not incapable of valuation either (a) because such interests were subject to a lien for the debt he owed his mother or (b) because of the contingency that he might not outlive her.

Both the Tax Court and the court below held that the debt was deductible from the value of the petitioner's interests in the trusts at the date of the gift. In order to determine such value, it was necessary only to take into account the conditions

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[1](b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

under which the petitioner would receive those interests, namely, in respect to the *inter vivos* trust, that he survive his mother, and in respect to the testamentary trust that he survive her and reach the age of 40. The discount factors to be used in determining the value of the petitioner's interests in the trusts, in view of these conditions, were not stipulated as we have said.[2] These factors were, however, later computed and furnished to the court below by the Government on the appeal and their correctness was not questioned by the petitioner. To the contrary, in his petition for rehearing the petitioner said that he specifically agreed in open court to be bound by the Commissioner's two actuarial factors, of $0.56445, as representing the present worth of the right of the petitioner to receive $1 at the death of his mother, and of $0.55377, as representing the present worth of $1 payable at the death of his mother, provided he attained the age of 40 at that time, "exactly as the Government counsel have contended here." (R. 80.) It was by the use of these factors that the court determined the value on the date of the gift of the petitioner's interest

[2] While the reason why they were not stipulated is unimportant here, it is that their application became necessary only in view of the Tax Court's holding, which was not anticipated by the parties at the time the stipulation was entered into, that the debt was deductible from the value of the petitioner's interests in his father's trusts and not from the value of their corpora.

in the trusts and that, after deducting his debt to his mother therefrom, it determined that there remained a balance of $668,731.98 as representing the value of the property from which the petitioner would receive income during his life and which would go to his children at his death. It is to this sum that the court below said the second stipulated factor should be applied to determine its present worth, which would be the amount subject to the gift tax (R. 74–75).[3] Thus the taxpayer had interests in the trusts his grandfather had created which were subject to valuation in terms of money. That was all that was necessary to the imposition of the tax.

2. Since the condition imposed by the eleventh article of the trust indenture was one which, by its very nature, might never occur, the gift was complete, and the Commissioner was bound to determine the tax upon facts and circumstances existing on the date the gift was made. To allow the taxpayer then to carry the case through the federal courts, and finally, confronted with an adjudication upholding the Commissioner, to recall the property previously given because the gift was held taxable, would be to require the federal courts to render advisory opinions. Accordingly, the court below held the condition contrary to public

[3] See also the Court's further explanation of this computation in its *per curiam* opinion denying the petition for rehearing (R. 92).

policy and, as such, invalid (R. 75–77). In any case, there is no conflict of decisions asserted on this point, and none in fact exists. So far as we are aware, a condition like that imposed by this trust indenture has not been encountered before.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
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SAMUEL O. CLARK, JR.,
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SEPTEMBER 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 376

FREDERIC W. PROCTER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

FREDERIC W. PROCTER,
Petitioner, Pro Se.

THOMAS H. FISHER,
Of Counsel.

UNITED STATES LAW PRINTING COMPANY, CHICAGO

SUBJECT INDEX

IN THE

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No. 376

FREDERIC W. PROCTER,

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

I.

The Alleged Gift was without Computable or Ascertainable Value and was therefore not Subject to Gift Tax.

Respondent's position on this point is contained in the sentence at the end of the completed paragraph on page 10

of his Brief, which reads as follows:

> "Here the petitioner's right to receive the corpora of the trust his grandfather had created depended solely, as regards the *inter vivos* trust, upon his surviving his mother and, as regards the testamentary trust, upon his surviving his mother and reaching the age of 40."

This completely ignores the principal element which renders the amount of the alleged gift incomputable and unascertainable, i. e., that Mrs. Procter may foreclose petitioner's indebtedness (as indeed she is now attempting to do) and thus deprive him of his entire inheritance, *thereby rendering the alleged gift of no value whatever.*

Respondent in his Brief studiously ignores this "key" uncertainty, which causes the alleged gift to be without computable or ascertainable value and therefore not subject to the gift tax.

Quite frankly, we do not see how it advances the argument for the respondent to ignore the entire point made in our petition.

Respondent says (p. 11):

> "Moreover, the value of the gift of the petitioner's future interests here in question was not incapable of valuation either (a) *because such interests were subject to a lien for the debt he owed his mother* or (b) because of the contingency that he might not outlive her." (Italics supplied.)

Respondent is here making the same argument which he made in the Tax Court, i. e., that petitioner's debt to his mother is merely in the form of "a lien" which could not be foreclosed until his mother's death.

The whole point made by petitioner and now concurred in by both the Tax Court and the Circuit Court of Appeals, adversely to respondent's contention, is that petitioner's debt to his mother was due and collectible upon the date of the alleged gift (being by its terms due upon demand, as she now asserts), and not merely upon his mother's death.

It would, we think, have been much franker if respondent had faced the true issue in this case raised by these considerations, instead of blandly ignoring them. For it is our position that if, as the Tax Court and the Circuit Court of Appeals have both found, the debt due petitioner's mother was enforceable at the moment of the alleged gift and not merely at her death, this huge present indebtedness of $686,300.03 introduced an uncertainty or contingency *for which no monetary computation is possible.* For it cannot be denied that should the debt be enforced prior to Mrs. Procter's death, neither petitioner nor his children as his donees will ever receive any gift whatsoever; and it would seem to follow that no gift tax would be due.

Petitioner concludes on this point (p. 13):

> "Thus the taxpayer had interests in the trusts his grandfather had created which were subject to *valuation in terms of money.* That was all that was necessary to the imposition of the tax." (Italics supplied.)

This statement is true *only* if the contingency to which respondent refers in his brief, i. e., the contingency that the debt may be foreclosed, be disregarded. For this statement cannot apply to the contingency of Mrs. Procter's foreclosing petitioner's indebtedness in her lifetime; since by no actuarial or other means is that contingency "subject to valuation in terms of money."

It follows that respondent has avoided and refused to meet the entire first point upon which our petition for certiorari is based.

II.

Article "Eleventh" of the Trust Indenture is not Void as against Public Policy.

Respondent's entire argument on this point is, first, that Article "Eleventh" would "require the federal courts to render *advisory opinions*" and, second, that "in any case, there is no conflict of decisions asserted on this point, and none in fact exists."

We fail to see what the determination of the existence of a liability for gift tax has to do with "advisory opinions" in the federal court. This appears to be a novel addition to the Circuit Court's argument that the enforcement of Article "Eleventh' would "obstruct the adminstration of justice by requiring the courts to pass upon a *moot* case." Apparently respondent agrees with petitioner that this is *not* a moot case. What respondent appears to argue is that there is a real issue over the validity and effect of the transfer, but that this issue has not yet arisen, thus rendering the decision as to tax liability merely "advisory."

We pointed out in our petition (p. 21) that controversies regarding gift taxes between taxpayers and the Commissioner of Internal Revenue arise and are litigated in our courts every day which involve the validity and effect of a transfer to a third person as donee, such as the alleged gift in this case. Such litigation is neither "moot" nor "advisory." Respondent elsewhere implies (p. 13-14) that

these are the same thing and that "Accordingly, the court below held the condition contrary to public policy, and, as such, invalid."

We respectfully submit that they are not the same thing at all; and that in any event the determination of the validity and effect of the condition precedent contained in Article "Eleventh," and the determination of a liability for gift taxes based thereon, is a *present* justiciable controversy of a *present* issue which is *presently* determinable in this proceeding. As such it is neither moot nor advisory.

As for the contention that "there is no conflict of decisions asserted on this point," we have on pages 17 and 18 of our petition cited a long list of authorities holding that such clauses as Article "Eleventh" are legally enforcible conditions precedent to the validity of such a transfer as that upon which the alleged gift in this case is based. It is certainly untrue, therefore, to say that "there is no conflict of decisions asserted on this point" in the light of these numerous authorities directly contrary to the decision in the instant case. For if these authorities are valid, then Article "Eleventh" is a valid condition precedent effective to defeat the transfer into trust in this case; and if the validity of this condition precedent be admitted under the authorities cited in our petition, it must follow that in the event named the gift itself was ineffective and that no gift tax is due.

In view of the very short paragraph devoted in respondent's brief to this important question, we may assume that respondent hopes to "brush the issue aside" as inconsequential by failing in his reply brief to treat this second point as worthy of this Court's consideration.

For our part we take the exactly contrary view, i. e., that this Court's ruling on Article "Eleventh" is a matter of major concern, not only in this case but in any case in which an alleged gift is subject to such a valid condition precedent. In this situation a square conflict between this case and another case *having exactly this same condition precedent* is unnecessary. Respondent's effort to belittle the importance of this question, by saying that no *precisely similar condition precedent* has been before the courts in a gift tax case, cannot affect our answer that the cases cited on pages 17 and 18 of our petition, if they were properly decided, inevitably defeat the liability for gift tax in this proceeding.

Respectfully submitted,

FREDERIC W. PROCTER,
Petitioner, Pro Se.

THOMAS H. FISHER,
Of Counsel.